IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 415 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE B.J.SHETHNA
and
Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

JAYANTIBHAI AMBUBHAI RATHVA

Versus

STATE OF GUJARAT

Appearance:
1. Criminal Appeal No. 415 of 1992
MS BANNA S DUTTA for Appellant No. 1
MR MA BUKHARI A.P.P for Respondent No. 1

CORAM : MR.JUSTICE B.J.SHETHNA
and
MR.JUSTICE D.P.BUCH

Date of decision: 27/11/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE B.J.SHETHNA)

The appellant-accused has challenged in this appeal the judgment and order of conviction and sentence dated 24th April, 1992, passed by the learned Additional Sessions Judge, Chhota Udepur, Vadodara in Sessions case No.41 of 1991, holding the appellant-accused guilty for the offences under Section 302, 323 and 325 I.P.C. and sentence him to suffer R.I. for life with fine of Rs.1,000/- in default, six months R.I. for the offence under Section 302 I.P.C., three years R.I. and fine of Rs.300/- in default, two months R.I. for the offences under Section 325 IPC. However, no separate sentence was passed for the offences under Section 323 IPC. Both the aforesaid sentences were ordered to run concurrently.

It is the case of the prosecution that on May 1, 1991 at about 5.00 p.m. the appellant-accused was constructing roof at his village Shiloj, but his father complainant Ambubhai Manjibhai told him not to construct the roof. At that time complainant Ambubhai tried to play with the little daughter of the accused. Thereupon, accused got excited and gave pick-axe (Kodali) blow on the head of the complainant as well as on the left wrist and caused fracture and thereby committed offences under Section 323 and 325. It is further the case of the prosecution that at the time of incident the eldest daughter Jinki and complainant came running and shouted at her brother-the present accused, that why he is beating her father? Thereupon, the accused got excited and gave blow with iron bar on the head of `Jinki' and also on her neck. Jinki succumbed to the injuries and thereby the accused committed offence under Section 302 IPC. The prosecution has examined; (1) Complainant Ambubhai P.W. 2 Exh.14, (2) Minor Jinki P.W. 3 Exh.16, (3) Minor Nariya P.W.4 Exh.17, as eye witness. Relying upon their evidence the learned trial Judge found accused guilty for the aforesaid offences and accordingly passed the order of conviction and sentence as stated earlier. Complainant Ambubhai P.W. 2 is an injured witness, he is none else but father of the accused. Injuries received by him are duly proved by the Doctor's evidence. Therefore, the incident in question cannot be ruled out. The presence of accused was very much established by the panchnama at Exh.27. Considering the evidence of the prosecution witness carefully, it appears that the prosecution has not disclosed the real story and the manner in which the incident took place. Specific questions were put to the complainant injured Ambubhai in his cross examination that he gave `kodali' blow to the wife of the accused for which the criminal case is pending against him. No doubt it is true that he has

denied the said suggestion. However, it has come out in the evidence of P.S.I. Kantilal Parmar P.W. 11 that the accused gave complaint first against his father Ambubhai for causing kodali injury to him and his wife and he was also chargesheeted for the same before the competent criminal court. It is unfortunate, that the medical certificate regarding injuries received by the accused as well as his wife have not been brought on the record by the prosecution. Be that as it may. The fact that injuries received by the accused and his wife during the incident is not explained by the injured complainant. Looking to the bare testimony of the child witnesses their evidence does not inspire any confidence. The complainant though specifically asked in his cross examination, but he was not ready to admit the criminal complaint filed earlier against him for causing injury to the accused as well as his wife with `kodali'. It clearly appears to us that to save his wife the accused must have assaulted the complainant and when Jinki intervened, she must have received the injuries with iron rod and died. Thus, it cannot be a case under Section 302 IPC. It is a case under Section 304 Part-I.

In view of the above discussion, we agree with the view taken by the learned Judge, that the proseuction has proved its case against the accused, but not for the offence under Section 302 IPC. The accused has committed offence under Section 304 Part-I IPC. Accordingly, we modify the order of the conviction and sentence from Section 302 IPC and convict the appellant for the offence under Section 304 Part-I IPC. It appears from the record that by now the appellant-accused has remained in jail for almost 10 years. Therefore, it is proper to pass an order of sentence as already undergone.

Thus, the appeal is partly allowed to the aforesaid extent. Accordingly we convict the accused for the offence under Section 304 Part-I and sentence him as already undergone. If he is not required in any other case he may be set at liberty forthwith. Fine if paid be refunded to the accused.

(B.J. Shethna, J.)

(D.P. Buch, J.)

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